

1 **BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD**
2 **WESTERN WASHINGTON REGION**
3 **STATE OF WASHINGTON**

4 FRIENDS OF CLARK COUNTY AND
5 FUTUREWISE,

Petitioners,

6 v.

7 CLARK COUNTY,
8

9 Respondent,

10 And

11 LAGLER REAL PROPERTY LLC AND
12 ACKLERLAND LLC,

13 Intervenors.
14

Case No. 16-2-0002

**FINAL ORDER GRANTING
SUMMARY JUDGMENT**

15 THIS Matter comes before the Board upon Petitioners' Friends of Clark County and
16 Futurewise Dispositive Motion or Motion for Summary Judgment¹ on Issue 1 requesting the
17 Board determine that Clark County Ordinance Nos. 2016-04-03 and 2016-05-03 regarding
18 Rural Industrial Land Banks violate RCW 36.70A.367(6) and 36.70A.130(4). Petitioners
19 also request the Board to remand the Ordinances to the County and make a determination
20 of invalidity for the two ordinances. Clark County and Intervenors Lagler Real Property LLC
21 and Ackerland LLC oppose the Dispositive Motion or Motion for Summary Judgment.² The

22 ¹ Friends of Clark County's and Futurewise's Dispositive Motion or Motion for Summary Judgment, (August 18,
23 2016).

24 ² Clark County Response to Petitioners' Dispositive Motion or Motion for Summary Judgment (August 29,
25 2016) and Intervenors Lagler Real Property LLC and Ackerland, LLC Response to Petitioners' Dispositive
26 Motion or Motion for Summary Judgment (August 29, 2016).

1 Board finds the County violated the GMA, grants the Motion for Summary Judgment and
2 remands Ordinances Nos. 2016-04-03 and 2016-05-03 to Clark County.

3 **I. PRESUMPTION OF VALIDITY, BURDEN OF PROOF,**
4 **AND STANDARD OF REVIEW**

5 Comprehensive plans and development regulations, and amendments, are
6 presumed valid upon adoption.³ This presumption creates a high threshold for the
7 Petitioners as the burden is on the Petitioners to demonstrate that action taken by Clark
8 County is not in compliance with the GMA.⁴ The Board is charged with adjudicating GMA
9 compliance and, when necessary, invalidating noncompliant plans and development
10 regulations.⁵ In order to find Clark County's action clearly erroneous, the Board must be
11 "left with the firm and definite conviction that a mistake has been committed."⁶

12 The standard of review for Petitioners' motion for summary judgment and imposition
13 of invalidity is derived from:

- 14 • **RCW 36.70A.300(3) *Final Orders*** in which the Board must find the local
15 jurisdiction is or is not in compliance with GMA;
- 16 • **RCW 36.70A.302 *Determination of Invalidity*** in which the Board must a.) find
17 non-compliance, b.) issue an order of remand under RCW 36.70A.300, and c.)
18 find the local jurisdiction's action would substantially interfere with fulfillment of
19 GMA goals and specify which parts of a comprehensive plan or regulation is

20 ³ RCW 36.70A.320(1) provides: [Except for the shoreline element of a comprehensive plan and applicable
21 development regulations] comprehensive plans and development regulations, and amendments thereto,
22 adopted under this chapter are presumed valid upon adoption.

23 ⁴ RCW 36.70A.320(2) provides: [Except when a city or county is subject to a Determination of Invalidity] the
24 burden is on the petitioner to demonstrate that any action taken by a state agency, county, or city under this
chapter is not in compliance with the requirements of this chapter.

25 ⁵ RCW 36.70A.280, RCW 36.70A.302.

26 ⁶ *City of Arlington v. CPSGMHB*, 162 Wn.2d 768, 778, 193 P.3d 1077 (2008) (Citing to *Dept. of Ecology v.*
PUD District No. 1 of Jefferson County, 121 Wn.2d 179, 201, 849 P.2d 646 1993); See also, *Swinomish Tribe,*
et al v. WWGMHB, 161 Wn.2d 415, 423-24, 166 P.3d 1198 (2007); *Lewis County v. WWGMHB*, 157 Wn.2d
488, 497-98, 139 P.3d 1096 (2006).

1 invalid. If the Board imposes invalidity, then invalidity is prospective and does not
2 extinguish vested rights;⁷ and

- 3 • **WAC 242-03-555 Dispositive Motions** in which the Board may dispose of issues
4 or a case based on the Board's jurisdiction, petitioner's standing or timeliness of
5 petitioners. "The board rarely entertains a motion for summary judgment *except*
6 *in a case of failure to act by a statutory deadline.*"⁸ (emphasis added)

7 II. PETITION FOR REVIEW

8 On April 26 and May 10, 2016, the Board of Clark County Councilors adopted two
9 ordinances to establish industrial land bank sites and amend the County's comprehensive
10 plan policies and regulations for industrial land banks.⁹ Petitioners' Petition for Review was
11 timely filed with the Board and identified three issues for review. In summary, Petitioners
12 claim the County violated GMA by:

13 Issue 1. Establishing industrial land banks after GMA legislative deadlines,

14 Issue 2. De-designating agricultural lands of long-term commercial significance, and

15 Issue 3. Failing to comply with requirements for industrial land banks.¹⁰

16 Petitioners requested the Board to find the County in violation of the GMA and remand the
17 ordinances to the County and make a determination of invalidity.¹¹

18 ⁷ RCW 36.70A.302 Growth management hearings board—Determination of invalidity—Vesting of development
19 permits—Interim controls.

20 ⁸ RCW 242-03-555(1).

21 ⁹ Clark County Ordinance No. 2016-04-03 (April 26, 2016) and Ordinance No. 2016-05-03 (May 10, 2016).

22 ¹⁰ Petitioners' Petition for Review, (June 20, 2016) at 3 Issue Statements 1. Did the adoption of Ordinance No.
23 2016-04-03 and Ordinance No. 2016-05-03 violate RCW 36.70A.367(6) and RCW 36.70A.130(1)(d) because
24 the industrial land banks were designated after the deadline in RCW 36.70A.367(6) and RCW 36.70A.130(4)?
25 2. Did the adoption of Ordinance No. 2016-04-03 and Ordinance No. 2016-05-03 violate RCW
26 36.70A.170(1)(a), RCW 36.70A.060(1)(a), 36.70A.020(8), RCW 36.70A.070, RCW 36.70A.130(1)(d), or the
Clark County comprehensive plan by de-designating approximately 602.4 acres of agricultural lands of long-
term commercial significance?

3. Did the adoption of Ordinance No. 2016-04-03 and Ordinance No. 2016-05-03 violate RCW RCW
36.70A.070, RCW 36.70A.130(1)(d), RCW 36.70A.210(2) or (3), the applicable provisions of RCW
36.70A.365(2), or RCW 36.70A.367(1), (2), (3), (4), or (7) by failing to comply with the requirements for
industrial land banks?

¹¹ *Id.* at 4-5.

III. MOTION FOR SUMMARY JUDGMENT AND RESPONSE

Petitioners' motion for summary judgment asks the Board to find the County failed to meet statutory deadlines in RCW 36.70A.367(6) and RCW 36.70A.130(4)¹² which, read together, required the County to establish industrial land banks by 2004. Petitioners argue that because RCW 36.70A.367(6) references RCW 36.70A.130(4), which requires comprehensive plan updates by 2004, the statutory deadline was 2004. Petitioners acknowledge the "County and Intervenor may try to argue that the legislature would not have extended the timelines for designating industrial land banks if they intended to leave the deadlines for Clark County on December 1, 2004."¹³ But, citing *Rest. Dev. Inc. v. Cananwill, Inc.*, Petitioners maintain the Board would "violate the rule of basic statutory construction by adding "and (5)" to RCW 36.70A.367(6)."¹⁴

Intervenor and Respondent oppose Petitioners' motion for summary judgment arguing the legislature intended to extend the deadline to 2016 for counties to designate industrial land banks. Citing *Campbell and Gwinn*, they urge the Board to look at "all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question."¹⁵ Further, they argue the legislature adopted a series of amendments extending the industrial land bank deadlines since 1998¹⁶ and that no county in the state could have approved a RILB (industrial land bank) after the last date stated in

¹² RCW 36.70A.367(6) "...the county shall take action to designate one or more industrial land banks and adopt conforming regulations as provided by subsection (2) of this section on or before the last date to complete that county's next periodic review under RCW 36.70A.130(4) that occurs prior to December 31, 2016."

RCW 36.70A.130(4) "...Except as provided in subsection (6) of this section, counties and cities shall take action to review and, if needed, revise their comprehensive plans and development regulations to ensure the plan and regulations comply with the requirements of this chapter as follows: (a) On or before December 1, 2004, for Clallam, Clark, Jefferson, King, Kitsap, Pierce, Snohomish, Thurston, and Whatcom counties and the cities within those counties..."

¹³ Dispositive Motion or Summary Judgment (August 18, 2016) at 6.

¹⁴ *Id.* and *Rest. Dev., Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 80 P.3d 598, 2003 Wash. LEXIS 887 (Wash. 2003).

¹⁵ *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 43 P.3d 4, 2002 Wash. LEXIS 188 (Wash. 2002) at 11.

¹⁶ Intervenor and Respondent's Response to Petitioners' Dispositive Motion or Motion for Summary Judgment (August 29, 2016) at 4.

1 RCW 36.70A.130(4) which is 2007.¹⁷ Intervenor and Respondent emphasize the legislative
2 intent by highlighting the words in RCW 36.70A.367(6) which read "...next periodic
3 review...that occurs prior to December 31, 2016." They argue the legislature intended the
4 deadline to be extended to December 2016, not December 2004 as Petitioners claim.
5 Finally, Intervenor and Respondent cite RCW 36.70A.367(2)(c) allowing counties to approve
6 an industrial land bank at any time.¹⁸ In sum, Intervenor and Respondent argue when the
7 County adopted its industrial land bank ordinances in April and May 2016, it was in full
8 compliance with legislative intent.

9 IV. ANALYSIS AND DISCUSSION

10 The question before the Board is whether we can interpret legislative intent regarding
11 deadlines to establish industrial land banks. The legislature may have intended to extend
12 the deadlines, but the Board can only construe legislative intent when it is ambiguous, not
13 when the statute is unambiguous. RCW 36.70A.367(6) unambiguously states a county
14 must act by the deadlines established in RCW 36.70A.130(4), and the deadline in RCW
15 36.70A.130(4) is the year 2004.

16 **RCW 36.70A.367(6)** In order to identify and approve locations for industrial land
17 banks, the county shall take action to designate one or more industrial land
18 banks and adopt conforming regulations as provided by subsection (2) of this
19 section on or before the last date to complete that county's next periodic review
20 under **RCW 36.70A.130(4)** that occurs prior to December 31, 2016. The authority
21 to take action to designate a land bank area in the comprehensive plan expires if
22 not acted upon by the county within the time frame provided in this section.
23 (Emphasis added)

24 ¹⁷ Id. at 5

25 ¹⁸ RCW 36.70A.367(2)(c) Final approval of an industrial land bank area under this section must be by
26 amendment to the comprehensive plan adopted under RCW 36.70A.070, and the amendment is exempt from
the limitation of RCW 36.70A.130(2) and may be considered at any time.

1 **RCW 36.70A.130(4)** Except as provided in subsection (6) of this section,
2 counties and cities shall take action to review and, if needed, revise their
comprehensive plans and development regulations to ensure the plan and
regulations comply with the requirements of this chapter as follows:

3 (a) **On or before December 1, 2004**, for Clallam, **Clark**, Jefferson, King,
4 Kitsap, Pierce, Snohomish, Thurston, and Whatcom counties and the
cities within those counties; (Emphasis added)

5 **RCW 36.70A.130(5)** Except as otherwise provided in subsections (6) and (8) of
6 this section, following the review of comprehensive plans and development
regulations required by subsection (4) of this section, counties and cities shall
7 take action to review and, if needed, revise their comprehensive plans and
development regulations to ensure the plan and regulations comply with the
8 requirements of this chapter as follows:

9 (a) On or before June 30, 2015, and every eight years thereafter, for King,
Pierce, and Snohomish counties and the cities within those counties;

10 (b) **On or before June 30, 2016**, and every eight years thereafter, for
11 Clallam, **Clark**, Island, Jefferson, Kitsap, Mason, San Juan, Skagit,
Thurston, and Whatcom counties and the cities within those counties;
12 (Emphasis added)

13 While the legislature changed the deadlines for comprehensive plan updates in RCW
36.70A.130(5) to 2016, it did not amend RCW 36.70A.367(6) to cross reference the 2016
14 deadline in RCW 36.70A.130(5). Instead, the legislature simply added a clause in RCW
15 36.70A.367(6): “that occurs prior to December 31, 2016.” The legislature could have, but
16 did not change .367(6)’s reference from .130(4) to .130(5). Alternatively, it could have
17 added the words “or .130(5)” to .367(6). Without construing legislative intent, as the County
18 and Intervenors urge, but instead reading the legislature’s plain language, we find the
19 County had until 2004 to designate industrial land banks under RCW 36.70A.367(6).

20 Appellate precedent requires the Board to focus on the plain meaning of the words in
the Growth Management Act, and if the Act is not ambiguous we are to apply that plain
21 meaning as an expression of legislative intent without considering extrinsic sources.¹⁹
22

23
24 ¹⁹ *Jametsky*, 179 Wn.2d at 762. We do not rewrite unambiguous statutory language under the guise of
interpretation. *Cerrillo v. Esparza*, 158 Wn.2d 194, 201, 142 P.3d 155 (2006). And we do not add language to

1 The Board finds and concludes that the plain language in RCW 36.70A.367(6)
2 directed Clark County to approve industrial land banks by 2004, but in this case, Clark
3 County failed to do so. The Board finds that Petitioners' have met their burden of proof
4 under Issue 1. Clark County did not adopt industrial land banks by 2004 and thus the
5 County violated RCW 36.70A.367(6). Accordingly, the dispositive motion or motion for
summary judgment is granted for Issue 1.

6 Having found that the County's adoption of Ordinances 2016-04-03 and 2016-05-03
7 failed to meet statutory deadlines in violation of RCW 36.70A.367(6), **the Board finds** that
8 Issues 2 and 3 are moot.

9 V. INVALIDITY

10 RCW 36.70A.302 allows the Board to determine part of or all of a comprehensive
11 plan is invalid if we find non-compliance with the GMA, find the plan would substantially
12 interfere with GMA goals, and specify which particular parts of the comprehensive plan are
13 to be declared invalid. The Board has found that the County failed to comply with the
14 required deadlines established in RCW 36.70A.367(6), but it cannot reach the remaining
two criteria to find invalidity.

15 The Board recognizes that this is a close question that implicates fundamental and
16 urgent issues of regional significance where delay in obtaining a final and prompt
17 determination of the appropriate construction of the statute may be detrimental to the parties
18 and/or the public interest. Possible detrimental impacts include delay in achievement of the
19 County's desire to stimulate economic development and the Intervenor's interests in
20 developing their properties. Additionally, the Board acknowledges the Petitioners' concerns
21 regarding the possibility of development applications vesting on lands alleged to be RCW
22 36.70A.170 designated agricultural lands of long-term commercial significance (See
Petitioners' Issue 3).

23
24 an unambiguous statute even if we believe the legislature "intended something else **but did not adequately
express it.**" *Kilian v. Atkinson*, 147 Wn.2d 16, 20, 50 P.3d 638 (2002). (Emphasis added)

1 However, the Board's conclusion that the challenged ordinances were not adopted
2 within the statutory deadline precludes issuance of a determination of invalidity as
3 requested by Petitioners. Under the Board's analysis, the County did not have the authority
4 to approve industrial land bank sites. That being the case, the Board has no jurisdiction to
5 consider the substantive issues of de-designation of agricultural lands (Issue 2) or
6 inconsistency (Issue 3), under which findings of non-compliance might support additional
7 findings of substantial interference with GMA goals. RCW 36.70A.302 allows the Board to
8 impose invalidity only when a jurisdiction's legislation has been found non-compliant and
9 remands for corrective action.²⁰ That is not the case before us.

10 VI. FINAL ORDER

11 Based on the foregoing, the Board finds the County's adoption of Ordinances 2016-
12 04-03 and 2016-05-03 failed to meet statutory deadlines and thus violating RCW
13 36.70A.367(6) and 36.70A130(4). The Board **remands** Ordinances Nos. 2016-04-03 and
14 2016-05-03 to Clark County. In order to comply with the GMA, the County must remedy
15 these items within 60 days of the date of this order. The following schedule for compliance,
16 briefing and hearing shall apply:

17 Compliance Due on identified areas of 18 noncompliance	November 9, 2016
19 Compliance Report/Statement of Actions Taken 20 to Comply and Index to Compliance Record	November 23, 2016
21 Objections to a Finding of Compliance	December 7, 2016

22 ²⁰ RCW 36.70A.302 Growth management hearings board—Determination of invalidity—Vesting of
23 development permits—Interim controls.

24 (1) The board may determine that part or all of a comprehensive plan or development regulations are
25 invalid if the board:

- 26 (a) Makes a finding of noncompliance and issues an order of remand under RCW 36.70A.300;
- (b) Includes in the final order a determination, supported by findings of fact and conclusions of law,
that the continued validity of part or parts of the plan or regulation would substantially interfere with the
fulfillment of the goals of this chapter; and
- (c) Specifies in the final order the particular part or parts of the plan or regulation that are determined
to be invalid, and the reasons for their invalidity.

Response to Objections	December 21, 2016
Telephonic Compliance Hearing Call 1 (800) 704-9804 Use Pin 7579646#	January 4, 2017 10:00 AM

Dated this 9th of September, 2016

Nina Carter, Board Member

Unavailable for signature

William Roehl, Board Member

Cheryl Pflug, Board Member

NOTE: This is a final decision and order of the Growth Management Hearings Board issued pursuant to RCW 36.70A.300.²¹

²¹ Should a party choose to do so, a motion for reconsideration must be filed with the Board and served on all parties within ten days of mailing of the final order. WAC 242-3-830(1), WAC 242-3-840. A party aggrieved by a final decision of the Board may appeal the decision to Superior Court within thirty days as provided in RCW 34.05.514 or 36.01.050. The petition for review of a final decision of the board shall be served on the board but it is not necessary to name the board as a party. See RCW 36.70A.300(5) and WAC 242-03-970. It is incumbent upon the parties to review all applicable statutes and rules. The staff of the Growth Management Hearings Board is not authorized to provide legal advice.

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